

### **REMARKS / ARGUMENTS**

Reconsideration of this application is respectfully requested in view of the above amendments and below remarks. This preliminary amendment is filed with a request for continued examination, and addresses the rejections set forth in the office action dated January 23, 2009.

### **Claims 22-30**

Applicant has withdrawn the claims 22-30.

### **Rejection Under 35 U.S.C. § 102(b)**

Claims 1-5 and 9-10 were rejected under 35 U.S.C. § 102(b) as being anticipated by Williams, U.S. 5,913,813.

### **Williams:**

Williams describes, in the Abstract: "An instrument for use in brachytherapy comprises a concentric arrangement of inner and outer distensible, spherical chambers disposed near the proximal end of a catheter body where one of the chambers is made to contain a radioactive material with the other chamber containing a radiation absorptive material, the apparatus functioning to provide a more uniform absorbed dose profile in tissue surrounding a cavity created by the removal of a tumor. An alternative embodiment includes non-spherical inner and outer chambers whose respective walls are spaced equidistant over the entire surfaces thereof..."

In order to support a rejection under 35 U.S.C. §102, it is noted that *every* limitation in the claims must be shown or suggested by the references.

Applicant's claim 1 recites:

“...A spacing apparatus for use with a brachytherapy device for treating target tissue surrounding a surgical extraction site, comprising ...  
an insertion member having a proximal end and a distal end...  
a spacing element disposed on the distal end of the insertion member, the spacing element having a predeterminable height and ***being adapted to contact an outer surface of a brachytherapy device and tissue at a surgical extraction site*** to position a brachytherapy device disposed within the surgical extraction site at a distance apart from the tissue , the distance being equal to the height of the spacing element...”

The Examiner relies on Williams as teaching the limitations of the claims, and recites several elements of Williams. The Examiner stated, in response to Applicant's previous arguments, that the double wall balloon catheter of Williams described and suggested the invention. However, while Williams describes “... Surrounding the spatial volume 30 is an outer chamber 34 defined by an outer polymeric film wall 36 that is appropriately spaced from the wall 32 of the inner chamber 30 when the two chambers are inflated...” it is noted that the wall 36 and wall 32 of Williams *do not contact each other*. In contrast, the claims, as amended, recite that the spacing element is adapted to contact an outer surface of a brachytherapy device. Accordingly, for at least the reason that Williams neither describes nor suggests every element of the claimed invention, and it is therefore requested that the rejection be withdrawn.

Claims 4-5 and 9-10 serve to add further patentable limitations to their allowable parent claims, but are allowable for at least the reason of their dependency on an allowable claim.

**Conclusion**

In light of the above Remarks, Applicants respectfully request that a timely Notice of Allowance be issued in this case. If the Office should have any questions or other issues to discuss, please do not hesitate to contact the undersigned attorney.

Applicants believe that a three month extension of time and a request for continuation fee are required along with this response; please consider this an authorization to charge Deposit Account No. 50-2855 accordingly. Any deficiency or overpayment may also be applied to Deposit Account No. 50-2855.

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Respectfully submitted,

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